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## MIDSTREAM ACREAGE DEDICATIONS: COVENANTS RUNNING WITH THE LAND OR A CONVEYANCING CONFUSION?

JORDAN D. VOLINO\*

### *Abstract*

The petroleum industry, through industrial booms and downturns, exceeds existing technological, contractual, and legal paradigms each year. Oftentimes, the industry moves at such a quick pace that novel ideas are thrust to the forefront with little time to evaluate their legal ramifications. Gathering, transportation, and processing technology now challenges attorneys with drafting midstream clauses with limited guidance. These novel clauses can lead to unintended consequences upon assignment or bankruptcy. The midstream acreage dedication clause has proven to cause such a consequence. This paper provides fundamental knowledge of midstream acreage commitments and dedications, validates their usage in gas gathering and processing agreements, analyzes whether a dedication can create a covenant running with the land under both Oklahoma and Texas law, discusses current case law affecting such dedication clauses, and proposes drafting tips to avoid both litigation and cancellation of acreage dedications under relevant bankruptcy law.

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*Introduction*

Gas producers enter into contracts for gas purchasing, gathering, processing, and transportation. Due to the unique nature of natural gas, these midstream contracts are usually entered into at the wellhead with the scope of services provided by the purchaser listed in detail, which will vary in nature based on the location and composition of the gas. Midstream companies often structure these contracts so that the gas purchaser, gatherer, or processor acquires rights to purchase, gather, and process all of the natural gas produced from a specified list of oil and gas leases, geographic area, or regulatory units. Oil and gas producers, with the need for a “firm”<sup>1</sup> commitment by the midstream company to take the produced gas, grant large acreage commitments and dedication clauses within these contracts.

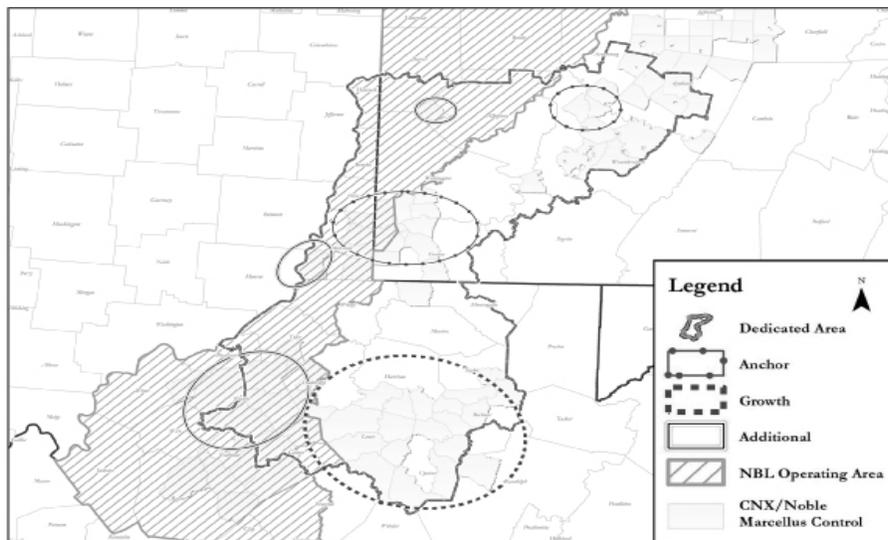


Figure 1. Example illustration of a midstream acreage dedication.<sup>2</sup>

Contractual provisions such as the acreage commitment or dedication clause can create an express covenant between the parties that entered into the agreement. Because the rights granted through these clauses concern

1. Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Oil & Gas Law, Manual of Terms*, 382 (2015) (“Firm” sales, in respect to gas purchasing contracts, refers to the higher classification of service that is continuous and without curtailment.).

2. Cone Midstream Partners LP, Amendment No. 3 to Form S-1 Registration Statement, at 123 (Form S-1/A) (September 17, 2014).

real property, the contractual provisions are considered real covenants. Real covenants, generally run with the land, extend to all who claim the land after the covenant was created, and descend to the successors in interest, assignees, or heirs. Through case law and interpretation, many jurisdictions have interpreted oil, gas, and other mineral interests as interests in real property. As such, these jurisdictions often use the historical pillars of property law to determine how to adjudicate novel legal disputes regarding mineral classifications.

The drafter of an acreage dedication clause is likely more concerned with securing producible gas commitments than creating a covenant running with the land. However, judicial interpretation of contractual intent can lead to unintended consequences later in the life of a contract. In an effort to address the impacts of bankruptcy on petroleum transactions, scholars and practitioners have started to recommend that midstream companies draft their contracts to specifically create an interest in realty, and, therefore, avoid the cancellation of such contracts during a bankruptcy proceeding. While case law regarding acreage dedications and commitment clauses is unclear, two recent bankruptcy decisions shed some light on the future interpretation of midstream contracts. While the holdings of these cases are fact-specific, they can offer limited guidance for counsel drafting acreage dedications or commitment clauses as well as the private practitioner interpreting these clauses in the event of litigation or bankruptcy.

This paper seeks to provide the fundamental understanding of midstream acreage commitments and dedications, illustrate the importance of such clauses for gathering and processing, analyze whether a dedication expires with the termination of the midstream contract or will create a covenant running with the land, as well as discuss recent court decisions construing such clauses, and proposes practical drafting tips to avoid litigation and cancellation of acreage dedications as executory in nature under Section 365 of the Bankruptcy Code.

#### *Midstream Acreage Dedications & Commitments*

Oil and gas producers customarily dedicate or promise to sell a volume of gas to be produced from their underlying minerals in return for a firm commitment by midstream companies to purchase, gather, process, and transport their gas. An acreage dedication is intended to assure a midstream company, and its respective investors, that a sufficient utilization of the midstream gathering and processing system will be used, and that the maximum amount of natural gas will be transported by a trunk pipeline.

This contractual provision varies by the company or drafter of the dedication clause. A standard midstream acreage dedication provides:

Subject to the terms of this Agreement, Producer commits and dedicates to the performance of this Agreement, during the Contract Term, all of the Gas now or hereafter Owned or Controlled by Producer that is produced from all current and future wells located on the lands covered by the oil and gas leases described on Exhibit \_\_\_\_\_, including any extensions or renewals of such oil and gas leases and any new oil and gas leases taken in replacement thereof prior to or within six (6) months after the expiration of any such oil and gas lease (collectively, the “Dedicated Leases”). For purposes of this Agreement, Gas is “Owned or Controlled” by Producer if Producer has title, whether by virtue of its ownership of a Dedicated Lease or otherwise, or, if Producer does not have title to such Gas, Producer has the right, under any joint operating agreement, unit operating agreement, or other contractual arrangement or arising by operation of Law, to commit and dedicate such Gas to the performance of this Agreement.<sup>3</sup>

A producer, either in addition to or in place of an acreage dedication, may grant the midstream company a wellbore dedication, which dedicates all the gas produced from a particular wellbore. A typical wellbore dedication may state that, “Producer dedicates . . . solely . . . all of the gas that is currently or may in the future become attributable to its Gas Rights in the wells identified . . . including, without limitation, all gas produced or attributable to all depths, zones, and formations associated with such wells.” Although there is no limitation on how dedications may be structured, this author intends that the above-described wellbore dedication to be simply illustrative in nature. The paradigm of this article is viewed through a larger lens, and will therefore be focused on field-wide acreage dedications rather than wellbore dedications.

#### *Covenants Running with the Land*

An express or implied covenant, whether in a contract related to land or in a conveyance of land, may be considered “real” if it *runs with the land* and extends to all who consider and claim the land after a sale, heirship, or

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3. Michael P. Pearson, *Selected Drafting Issues in Midstream Contracts*, 14th Annual Gas and Power Institute (Sept. 10-11, 2015).

decree.<sup>4</sup> Restrictive covenants, therefore, create covenants running with the land if the covenant either creates a burden or benefit to the land.<sup>5</sup> A modern trend in case law and legislation is to refer to covenants as equitable servitudes, however covenants are considered to run with the land if they encompass both realty as well as equitable servitudes, and should only be treated differently in manners of jurisdictional enforcement.<sup>6</sup> Case law has long recognized real covenants as:

the legal right of owners of . . . properties to bind themselves by enforceable contract, restraining the use of their property for an unlimited period of time, wherein each separate owner grants to the other owners a right in his property in the nature of an easement and which shall run with the land and be binding upon the several property owners as well as all future owners, who succeed to title with actual or constructive notice of such contract or agreement and its terms.<sup>7</sup>

As historically and currently recognized, real covenants running with the land may either express or stated, implied in nature, or created by contractual provision.

Due to the high cost required to extract, produce, gather, and process natural gas, reliable, clear, and concise contractual drafting is vital to midstream companies. Installing pipelines and other infrastructure requires the use of real property. The right to use this property is acquired either through surface easements or pipeline rights-of-way, which facilitates gas processing and transportation. Operating both on and under realty will invoke real covenants if the benefit or burden to the land will pass to successors in interest.

#### *Oklahoma Treatment of Covenants Running with the Land*

Under Oklahoma law, “a covenant running with the land is one relating to the land, or as more commonly said one which ‘*touches and concerns*’ the land itself, so that *its benefit or obligation passes with the ownership*.”<sup>8</sup>

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4. R. Cuthbert Brown, *The Law Relating to Covenants Running With Land* 8 (1907) (emphasis added).

5. 2 Joyce Palomar, Patton and Palomar on Land Titles § 349 (3d ed. 2002)

6. *Id.*; Restatement (Third) of Prop.: Servitudes § 1.4 at 30 (2000).

7. *Vranesevich v. Pearl Craft*, 241 P.3d 250, 253 (Okla. Civ. App. 2010) (citation omitted).

8. *Local Fed. Sav. & Loan Ass'n of Okla. City v. Eckroat*, 100 P.2d 261, 262 (Okla. 1940) (emphasis added) (citation omitted).

A real covenant is one that is deemed “so connected with the underlying realty that either the right to enforce the covenant's performance . . . or the duty to perform the covenant's obligation . . . or both, passes to the heirs or grantees of one or both of the original covenanting parties by operation of law without express assignment or delegation.”<sup>9</sup> Such real covenant will benefit or burden remote parties “because they acquire an interest in land that carries the benefit or burden along with it,” provided the real covenant satisfies the conditions imposed by law.<sup>10</sup>

Although as many as five conditions to create a covenant are recognized by other jurisdictions, Oklahoma has generally identified only three conditions for the creation of a real covenant, such as:

“(a) there must be a valid privity of estate between the party claiming the benefit and the party upon whom the burden rests upon, (b) the benefit or burden must “touch and concern” the land in question, and (c) the original covenanting parties must have intended for the burden or benefit to pass to successors and assigns.”<sup>11</sup>

A covenant that lacks any of the aforementioned elements is regarded as a personal covenant, and is treated as an ordinary contractual provision that remains binding only upon the parties who entered into the agreement.<sup>12</sup>

In *Richardson v. Mustang Fuel Corp.*, landowners brought an action to prevent a midstream company from ceasing sales of produced gas to the landowners under a stipulation that was a portion of the consideration for granting it pipeline rights-of-way.<sup>13</sup> The landowners had bargained for a stipulation in their rights-of-way that required Mustang to sell gas from its pipeline to landowners at a competitive market price.<sup>14</sup> The rights-of-way were to last until gas transportation by and through the rights-of-way ceased.<sup>15</sup> Mustang benefitted in this agreement by having express pipeline

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9. *Beattie v. State ex rel. Grand River Dam Auth.*, 41 P.3d 377, 386 (Okla. 2002) (Opala, J., concurring).

10. *Id.* at 387 (citation omitted).

11. *Id.*; (These additional considerations recognized by other jurisdictions include having a signed writing to satisfy the Statute of Frauds and the existence of recognized legal privity between the original covenanting parties.) See Roger A. Cunningham, et al., *The Law of Property* § 8.13, at 466-69 (2nd ed. 1993).

12. *Vulcan Materials Co. v. Miller*, 691 So. 2d 908, 913-14 (Miss. 1997).

13. 772 P.2d 1324, 1325-26 (Okla. 1989).

14. *Id.* at 1327.

15. *Id.* at 1328.

rights-of-way to sell the produced gas, while still retaining the obligation to supply local gas to the landowners.<sup>16</sup>

The Oklahoma Supreme Court held that both the pipeline rights-of-way and the express obligations to supply gas to the landowners satisfied the requirements of real covenants running with the land.<sup>17</sup> The pipeline rights-of-way that limited the landowners' use of their land was deemed to touch and concern the land. "Similarly, the opportunity for a rural landowner to have a readily available supply of natural gas enhance[d] the value and utility of [their] realty."<sup>18</sup> Therefore, the court found that both of the express covenants at issue affected the land, and ultimately satisfied the definition of real covenants that ran with the land.

#### *Texas Treatment of Covenants Running with the Land*

Under applicable Texas law, simply declaring an express covenant through a contract does not create a covenant running with the land.<sup>19</sup> Instead, Texas law holds that a covenant running with the land is created when: (1) there is privity of estate between the two parties, (2) the covenant "touches and concerns" the land, (3) the covenant "relates to a thing in existence or specifically binds the parties and their assigns," (4) the covenant is "intended by the original parties to run with the land," and (5) the successor in interest to the burdened land has notice of the covenant.<sup>20</sup>

Within the Court's opinion of *In re Energytec, Inc.*, the United States Court of Appeals for the Fifth Circuit addressed the application of tests for determining a covenant running with the land regarding a sale of petroleum assets in a bankruptcy.<sup>21</sup> The contract analyzed in *Energytec* was a transactional 1999 Letter Agreement, between Energytec's predecessor, Mescalero, and Newco.<sup>22</sup> The agreement sold all of Mescalero's interest in a gas pipeline, associated rights-of-way, and an accompanying gas

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16. *Id.*

17. *Id.*

18. *Id.* at 1328.

19. *See e.g.*, *Musgrave v. Brookhaven Lake Property Owners Ass'n*, 990 S.W.2d 386, 394-95 (Tex. App. 1999) (holding that terminology does not determine parties' intent to create covenants running with the land).

20. *Inwood N. Homeowners' Ass'n Inc. v. Harris*, 736 S.W.2d 632, 635 (Tex. 1987); *see also* *Lesley v. Veterans Land Bd.*, 281 S.W.3d 602 (Tex. App. 2009), *aff'd in part, rev'd in part on other grounds*, 352 S.W.3d 479 (Tex. 2011); *Lyle v. Jane Guinn Revocable Tr.*, 365 S.W.3d (Tex. App. 2010).

21. 739 F.3d 215 (5th Cir. 2013).

22. *Id.* at 217.

processing plant.<sup>23</sup> It also created a monthly “transportation fee,” secured by both a mortgage and security lien, that was to be paid to Newco.<sup>24</sup> The agreement required the holder of Mescalero’s interest to obtain Newco’s consent before assigning its interest along with specifying that Newco’s interest in the “transportation fee” within the agreement created a covenant “running with the land.”<sup>25</sup>

During the pendency of its bankruptcy, Energytec petitioned the bankruptcy court to approve the sale of its pipeline assets, free and clear of any encumbrances or liens, which included the 1999 Letter Agreement.<sup>26</sup> The bankruptcy court found that the 1999 Letter Agreement was executory in nature and did not create a covenant running with the land, and therefore, allowed the sale of the pipeline assets unencumbered by the mortgage and security interest.<sup>27</sup> On appeal, the Fifth Circuit reversed the decision of the lower courts and held that the 1999 Letter Agreement did create an interest in realty sufficient to constitute a covenant running with the land.<sup>28</sup> The court, after reexamination of the 1999 Letter Agreement, bill of sale, and recordation of the realty interest, found that the contract “touched and concerned the land” as well as contained a valid privity of estate between the parties concerned.<sup>29</sup>

In determining a cogent test for whether contractual provisions “touched and concerned the land,” the court stated that an interpreter must assess whether the covenant “affect[s] the nature, quality, or value of the thing demised, independently of collateral circumstances, or if it affect[s] the mode of enjoying it” as well as whether the benefit of the covenant increases the inherent interest in the land or thereby reduces the value.<sup>30</sup> Therefore, in Texas, a valid creation of a covenant running with the land will be deemed proper if the beneficial interest “touches and concerns the land” and the parties have appropriate privity of estate.

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23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* at 218.

27. *Id.*

28. *Id.* at 226.

29. *Id.* at 223-25.

30. *Id.* at 223-24, citing *Westland Oil Dev. Corp. v. Gulf Oil Corp.*, 637 S.W.2d 903, 911 (Tex. 1982).

*Recent Bankruptcy Litigation Regarding Acreage Dedications*

Novel issues regarding real covenants can arise in unforeseen ways, such as the judicial interpretation of real covenants in midstream acreage dedications. When a court addresses patently new technologies and contracts, it must refer to historical common law principles to guide its determination. Such determinations left the midstream industry in awe following the *Sabine* and *Quicksilver Resources* bankruptcy decisions.

In *Sabine*, the debtors in the case filed a motion to reject two midstream gathering agreements.<sup>31</sup> The counterparties, or the midstream gathering companies, filed responses opposing cancellation of their respective contracts, arguing that their gathering agreements contained covenants that ran with the land, and therefore could not be rejected during the pendency of bankruptcy proceedings.<sup>32</sup> The midstream companies relied on *Energystec* for the proposition that certain rights connected to a gas pipeline – in particular, the right to receive a transportation fee and consent rights – were real covenants running with the land under Texas law, and therefore could not be rejected during bankruptcy.<sup>33</sup>

The *Sabine* court drew a critical distinction between the case before it and *Energystec*. It reasoned that *Energystec* involved a gas production encumbrance reserved by the grantor for the benefit of another party deriving out of a larger conveyance of its interest.<sup>34</sup> Such a contractual reservation created horizontal privity of estate between the parties legally sufficient to create a real covenant running with the land.<sup>35</sup> In *Sabine*, the court drew a stark contrast to the *Energystec* production encumbrance. The court contrasted such decisions using the gathering agreements which contained acreage dedications. The *Sabine* court reasoned that the respective midstream acreage dedications, applying the historical principles of property law and legal privity to covenants touching the land, did not reserve an interest in real property sufficient to create a covenant running with the land.<sup>36</sup> Thus the court reasoned in the *Sabine* decision that the critical distinction between the cases is whether the midstream acreage dedication is drafted to cover “production,” as in a severed interest in property, or the dedication expressly covers an interest in the mineral estate.

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31. *See In re Sabine Oil & Gas Corp.*, 550 B.R. 59, 71 (Bankr. S.D.N.Y. 2016).

32. *Id.* at 72.

33. *Id.* at 76.

34. *Energystec*, 739 F.3d 215 at 224-25.

35. *Id.*

36. *Sabine*, 550 B.R. 59 at 69-70.

In *Quicksilver Resources*, debtors announced BlueStone Natural Resources II, LLC, as the successful bidder in an auction of debtors' gathering and transportation assets.<sup>37</sup> Debtors and BlueStone, upon finalization of bidding for the midstream assets, executed an Asset Purchase Agreement. As a condition precedent of BlueStone's obligation to close the transaction, BlueStone sought a court order rejecting a large number of midstream agreements as personal covenants rather than real covenants which would run with the land and assets.<sup>38</sup>

After finalization of the purchase agreement and negotiations, the presiding judge entered a sale order that approved the BlueStone Purchase Agreement.<sup>39</sup> This sale order included findings and determinations that BlueStone would not have entered into the Purchase Agreement if the sale was not, pursuant to the federal bankruptcy code and regulations, a free and unencumbered interest in minerals, including "any dedication under any gathering, transportation, treating, purchasing or similar agreement that relates solely to any Contract set forth [within the Purchase Agreement] and any other such contract that is not assumed by or assigned to [BlueStone]."<sup>40</sup> The sale order also provides that Debtors could sell the assets free and clear of all interests because, "in each case, one or more of the standards set forth in Bankruptcy Code [§]363(f)(1)-(5) has been satisfied," but does not provide explanation as to which provision of §363(f) applies to the midstream contracts.<sup>41</sup> The court, perhaps unknowingly, referred to the interests as personal rather than real, and therefore executory, without delineating what specific language of the bankruptcy code that would operate in this instance.

Although both *Sabine* and *Quicksilver Resources* regarded executory contract cancellation in the bankruptcy context, the issue of whether a midstream clause creates a covenant running with the land is one of the most noteworthy issues that stemmed from the collection of cases. Even

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37. See *In re Quicksilver Res. Inc.*, 544 B.R. 781 (Bankr. D. Del. 2016); see also Order Approving the Sale of Debtors' Oil and Gas Assets at 5, *Quicksilver Res.*, (No. 15-10585) (Doc. 1095, filed 01/27/16) available at Bloomberg Law; Press Release, Tulsa's BlueStone Natural Resources Approved by Federal Bankruptcy Court as the Winning Bidder for Quicksilver Resources' U.S. Oil & Gas Assets (Jan. 29, 2016), <http://www.bluestone-nr.com/?q=content/tulsa's-bluestone-natural-resources-approved-federal-bankruptcy-court-winning-bidder-quicksi>.

38. See Order Approving the Sale of Debtors' Oil and Gas Assets, *Quicksilver Res.*, (No. 15-10585) (Doc. 1095, filed 01/27/16) available at Bloomberg Law.

39. *Id.*

40. *Id.* at 10.

41. *Id.* at 13.

though *Sabine* deviated from *Energytec's* reasoning, all three cases provide guidance when structuring gas purchase, gathering, and processing agreements to create express covenants that run with the land, and mitigate the chance of contractual cancellation in bankruptcy proceedings.

*Oil and Gas Lease Implications—Can an Interest Even Travel?*

An ancillary, but important, issue, worth noting is whether an oil and gas lease can grant an interest in the mineral estate that could be transferred as a real property interest within a midstream acreage dedication. Although jurisdictional nuances differ, mineral producing states treat subsurface minerals as an interest in realty. Under Oklahoma law, the owner of land does not hold a possessory interest in the oil or gas under his land until those substances are physically extracted and reduced to possession.<sup>42</sup> The Oklahoma classification of oil, gas, and mineral ownership is usually referred to as the "exclusive-right-to-take" theory.<sup>43</sup> Due to the fugacious nature of minerals and the law of capture, a landowner or mineral owner has the "exclusive right to drill for, produce, or otherwise gain possession of [petroleum-based] substances."<sup>44</sup> Included in these exclusive rights is "the right to reduce to possession oil and gas 'coming from land belonging to others.'"<sup>45</sup> Practitioners and scholars alike in Texas have steadily adhered to the principle that an oil and gas lease, regardless of the character, language, or drafting of the granting clause, creates in the lessee a corporeal defeasible or determinable fee interest in the oil and gas. Texas courts have

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42. See *Arrowhead Energy, Inc. v. Baron Exploration Co.*, 930 P.2d 181, 182 (Okla. 1996); *Bonner v. Okla. Rock Corp.*, 863 P.2d 1176, 1185 (Okla. 1993).

43. See *Sabine Corp. v. ONG W. Inc.*, 725 F. Supp. 1157, 1178 (W.D. Okla. 1989); see also *In re Levy*, 94 P.2d 537, 538 (Okla. 1939) (stating that "an oil and gas lease has been defined as 'a grant of the exclusive right . . . to take all the oil and gas that could be found by drilling wells upon the particular tract'").

44. See *Atl. Richfield Co. v. Tomlinson*, 859 P.2d 1088, 1094 (Okla. 1993); see also *Feely v. Davis*, 784 P.2d 1066, 1068 (Okla. 1989) ("[T]he landowner or mineral owner only has an exclusive right to attempt to gain possession of the oil and gas underlying the owner's property. No absolute title to oil and gas is obtained until those minerals are reduced to actual possession"); *Frost v. Ponca City*, 541 P.2d 1321, 1323 (Okla. 1975) (concluding that under the law of capture, a landowner has "an exclusive right to drill for, produce, or otherwise gain possession of such substances, subject only to restrictions and regulations pursuant to police power").

45. *Tomlinson*, 859 P.2d at 1094 (quoting *Kuykendall v. Corp. Comm'n*, 634 P.2d 711, 716 (Okla. 1981)).

universally upheld the determinable fee theory of mineral ownership that an oil and gas lease operates as a present sale of the oil and gas “in place.”<sup>46</sup>

Regardless of jurisdictional classifications, the mineral owner holds several rights as a result of their exclusive right to take the oil and gas underlying a certain tract of land. Included in these rights are 1) the right to develop the minerals; 2) the executive right (i.e., the power to execute a lease conveying the development right); 3) the right to receive bonus (i.e., a cash payment made for execution of a lease); 4) the right to receive delay-rental payments; 5) the right to receive royalty; and 6) the right to receive shut-in royalty.<sup>47</sup> The owner of the mineral interest may, in theory, sever any or all of these interests by transferring each of them to different parties.<sup>48</sup>

Regardless of jurisdiction, an oil and gas lease grants the lessee or operator a wide range of real property interests so that they may efficiently produce the minerals. Interests in minerals may be non-participating, for a term, indefeasible, defeasible, vested, or future remainders. Because these various interests are deemed to be real in nature, such clauses granting an interest in the mineral or surface estate will have been deemed to create a legal interest in the land or leasehold. Therefore, mineral leases should likely be considered to grant sufficient interests in the realty for midstream acreage dedications to be construed as a valid contractual clause.

#### *Drafting Dedications—Carefully Creating Covenants Running with the Land*

Through interpretation of historical land title principles and contemporary case law, a practitioner, with careful language and attention to detail, can successfully draft a midstream acreage dedication creating a real covenant. Although Oklahoma and Texas courts differ slightly as to the requirements in creating a real covenant, when combined, the approaches can create a systematic way to assure a client that a midstream dedication actually creates a real covenant in either jurisdiction.

A real covenant can be created when: (1) there is privity of estate between the parties, (2) the covenant touches and concerns, burdens or benefits the land, (3) the covenant relates to an existing interest or specifically and expressly binds the parties and their assigns, (4) the

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46. *Southern Oil Co. v. Colquitt*, 69 S.W. 169, 171 (Tex. Civ. App. 1902).

47. *See Owen L. Anderson, et. al., Hemingway Oil and Gas Law and Taxation 2.1*, at 38-39 (4th ed. 2004).

48. *See Anderson v. Mayberry*, 661 P.2d 535, 536 (Okla. Civ. App. 1983).

covenant is intended by the covenanting parties to run with the land, and (5) the successor to the burden has notice. In addition, an express provision concerning the land interest dedication will clarify any ambiguity regarding the parties' intent as well as satisfy the Statute of Frauds writing requirement. Following the recent decisions in *Sabine* and *Energytec*, an acreage dedication must address the incorporeal mineral estate rather than severed personal property to be considered a real covenant.

The following acreage dedication clause is a suggested provision that will likely create a covenant running with the land:

The dedication by Producer of the Gas production described in the preceding paragraph to the performance of this Agreement shall be deemed by the parties intent to create an express covenant running with the land with respect to the Dedicated Leases, shall be deemed to convey to Midstream Company interests in property with respect to the Dedicated Leases, and shall be binding upon all of Producer's permitted successors and assigns. To that end, counterparts of a recording memorandum for this Agreement, a form of which is attached hereto as Exhibit \_\_\_\_\_, shall be filed of record in all counties/parishes in which the lands covered by the Dedicated Leases are located. If, at any time during the Contract Term, Producer sells, transfers, conveys, assigns, or otherwise disposes of all or any portion of its interests in the Dedicated Leases, any such sale, transfer, conveyance, assignment, or other disposition shall expressly be made subject to the terms of this Agreement.<sup>49</sup>

Such careful drafting, which addresses all requirements necessary to create a covenant running with a land, will satisfy all parties involved, albeit for different reasons. With correct classification of acreage dedications, oil and gas producers can analyze their own agreements to clarify each agreement's status in a bankruptcy. Midstream companies can create enforceable agreements that will survive through the succession of owners or assignments. Private equity investors and capital providers will be able to adequately analyze, assess, and manage risk in their finance portfolios if midstream assets are included.

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49. Pearson, *supra* note 3, at 7.

*Conclusion*

Ultimately, the legal analysis of whether a midstream contract may be rejected in a bankruptcy proceeding hinges on the precise language of the contract and the court's interpretation of whether or not the contract creates a real property covenant that runs with the land. The determination of midstream contracts as containing covenants running with the land are incredibly important for the recovery value of midstream asset sale prospects. These midstream acreage dedications may be treated as mere contractual interests or as covenants running with the land. Upon a finding that the midstream dedication creates a covenant, the contract will survive through successors, assigns, and even bankruptcy proceedings. But, if a court determines that the acreage dedication is a mere contractual interest, the interest will extinguish with the contract, and energy creditors may face substantial claim dilution in bankruptcy.

Careful determination of parties' intent and drafting can mitigate the confusion that midstream dedications have unknowingly created. Energy production companies and practitioners alike can glean an instructive lesson from cases such as *Sabine* to further assure their client's gross production and contractual standing while mitigating unforeseen legal consequences.